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No. 99-681

IN THE

Supreme Court of the United States

BARRY ACKERLEY, *et al.*,

Petitioners,

v.

LAURA A. LAMBERT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NEAL D. MOLLEN
Counsel of Record
KEITH R. FENTONMILLER
PAUL, HASTINGS, JANOFSKY & WALKER LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004
(202) 508-9500

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States

156664

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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This Brief is submitted by The Chamber of Commerce of the United States of America (the "Chamber"), as *amicus curiae* in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members of every size, in every sector and region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 500 cases of importance to the business community. Those cases include the Court's recent decision regarding the Fair Labor Standards Act ("FLSA" or the "Act"), *Auer v. Robbins*, 519 U.S. 452 (1997), as well as other cases dealing with various aspects of federal employment law. *See, e.g., Kolstad v. ADA*, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352 (1995); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

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1. This brief was written entirely by counsel for the Chamber of Commerce of the United States, and no entity other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

2. The court of appeals' decision in this case will have an immediate and profoundly negative impact on the Chamber's members if it is not reviewed by this Court. The decision below undermines the single, overriding desire of every American business with respect to the enforcement of federal employment laws — the desire for intelligible standards uniformly applied. Because the court of appeals decision deepens an existing division of authority among the courts of appeals on two important questions, the decision leaves different employers — and different operations of the same employer — subject to different rules of law.

3. The decision below purports to make individual managers personally liable for FLSA violations — even when those violations stem from good faith but mistaken judgments about the requirements of the Act. The decision thus will make management responsibilities substantially less attractive to individuals employed by Chamber members. This, in turn, will make even more difficult the efforts of American business to find and cultivate the managerial skills upon which Chamber members rely for effective implementation of federal employment law, including the FLSA. Because the Chamber is uniquely situated to bring the concerns of American business to the Court, it submits this brief.

REASONS FOR GRANTING THE WRIT

Uniformity and predictability in the law are among the most important goals sought by the Chamber and its members. The Chamber often has strong views about the proper interpretation and application of various federal laws that regulate the employment relationship, including the FLSA. More important to the Chamber, its members, and

the individuals they employ than any particular construction of federal law, however, is the existence of uniform, predictable, and easily-understood standards governing employer and managerial conduct.

The interests of clarity, uniformity, and predictability were roughly treated in the decision below. First, the decision broadens an existing division of authority on the threshold question posed in this case: whether an individual "fil[es] a complaint" — and thus triggers the anti-retaliation provisions of the Fair Labor Standard Act — when he complains to his boss about his overtime wages. 29 U.S.C. § 215(a)(3).

As explained below, the language of the Act, its legislative history, and the relationship of the FLSA's anti-retaliation language to language used in various other employment statutes all indicate that the answer to this question must be "no." But whatever the Court's conclusion on the merits of this question, it is inherently unsatisfactory to have employees and employers in different states subject to different rules of substantive liability on a question of such obvious importance.

Second, the decision below adopts a dangerously flawed methodology for statutory construction incompatible with this Court's opinions. The court of appeals' rationale rested, not on the plain language of the statute or its legislative history, or on the basis of any other accepted canon of statutory construction, but on what it perceived as the "animating spirit" of the Act.[2] This focus on policy objectives, rather than statutory analysis, produced "judicial

2. Pet. App. 8a.

legislation"[3] rather than statutory construction, "judge-made law . . . based on self-mesmerized views of economic and social theory."[4] The interests of justice are undermined whenever courts leave behind the enacted text of a statute in a search for its "spirit." The goal of predictability suffers when employers and employees must divine the "spirit" of the law to determine what it requires, rather than simply read the language selected by Congress.

Finally, the court of appeals' decision underscores the lower courts' confusion regarding a central question under the FLSA: whether, and if so in what circumstances, individual managers can be held liable as statutory "employers" for violations of the FLSA. According to the decision below, every manager is a statutory "employer" — and thus every manager can be held individually liable for mistaken wage payments — so long as the manager has "control over the nature and structure of the employment relationship. . . ." Pet. App. 25a.

This amorphous standard undermines this Court's more recent effort to rationalize and unify the standards of liability under employment statutes. The rationale adopted by the court of appeals would make managers — even entirely innocent ones — personally liable should their companies make erroneous judgments about who is and is not exempt from the overtime requirements of the Act, and what is and is not compensable time. Such an unfair and punitive standard

3. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944).

4. *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 453 (1987) (*quoting Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969)).

creates a powerful disincentive for individuals considering management responsibilities.

I.

THIS COURT SHOULD RESOLVE A PATENT CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF THE FLSA'S ANTI-RETALIATION PROVISION AND BRING THE NINTH CIRCUIT'S METHODOLOGY FOR STATUTORY CONSTRUCTION INTO LINE WITH THIS COURT'S OPINIONS.

A. The Conflict Is Patent, The Question Posed Is Important, And The Conflict Can Be Resolved Only By This Court

As the Ninth Circuit itself recognized in its opinion, its decision deepens a direct conflict among the courts of appeals on the threshold question posed in this case: whether an employee triggers the anti-retaliation provisions of the Fair Labor Standards Act by expressing to his employer a disagreement regarding overtime wages. Pet. App. 6a-7a.[5] The provision extends protection to those that have "filed a complaint" under or related to the FLSA. 29 U.S.C. § 215(a)(3). The Ninth Circuit held that informal expressions of disagreement amount to "filed . . . complaint[s]" — overruling a panel decision to the contrary. Pet. App. 9a-10a. Several other circuits have agreed. *Id.* at 6a-7a (collecting cases). The Second Circuit has held (as have a number of district courts) that this kind of complaint is not sufficient.[6] Only this Court can resolve this conflict.

5. The plaintiffs in this case put their wage demands in writing, but in the Ninth Circuit's view, neither the form nor the forum of the expressed disagreement matters; any expressed dissatisfaction qualifies as a "filed . . . complaint."

6. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *O'Neill v. Allendale Mut. Ins.*

(Cont'd)

This Court has noted that there are circumstances in which divisions of opinion among the circuit courts on questions of federal law are tolerable. For example, the split of authority may concern a question of law that is technical or unimportant, or that arises too infrequently, to warrant treatment by the Court. Similarly, the Court has declined to review cases involving circuit splits — even on important issues — where only a few lower courts have addressed the issue and the questions presented require "further study" in the lower courts.[7] Finally, the Court has declined to review cases where a disagreement among the courts of appeals on a matter of law has been overtaken by subsequent events — for example, when the underlying statute has since been amended or has expired.[8]

None of these circumstances is present here. The FLSA's anti-retaliation prohibition applies to every "person" in the country, 29 U.S.C. § 215(a); the law's overtime and minimum wage requirements apply to quite nearly every employer, 29 U.S.C. §§ 206(a), 207(a); and the majority of employees in the national economy are protected by the FLSA's wage standards. The issue presented here has arisen repeatedly and undoubtedly will arise again and again; it is the subject of at least eight published circuit court opinions.[9]

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Co., 956 F. Supp. 661, 664 (E.D. Va. 1997); *see Ball v. Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 346 (E.D. Va. 1999); and *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp.2d 322, 324 (W.D. Va. 1999).

7. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.; dissenting from the denial of *cert.*); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J.; dissenting from the denial of *cert.*).

8. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.4, at 172 (7th ed. 1993).

9. *See, e.g., Conner v. Schnuck Mkts.*, 121 F.3d 1390 (10th Cir. 1997); *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996),
(Cont'd)

This controversy is a live and important one, and it will not go away unless and until this Court resolves the matter.

B. The Ninth Circuit's Methodology For Statutory Construction Cannot Be Reconciled With This Court's Decisions

This Court has marked out the proper procedure for analyzing statutory language on many occasions. The process is supposed to begin (and in the great run of cases, will end) with the language of the statute itself.[10]

The statutory language in this case protects from discrimination those who have "filed a complaint" relating to the FLSA. 29 U.S.C. § 215(a)(3). The Ninth Circuit read the word "filed" to mean "uttered" or "expressed" and the word "complaint" to mean "disagreement."

To achieve this result, the court of appeals was compelled to adopt an unwarranted perversion of the ordinary process for

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cert. denied, 520 U.S. 1186 (1997); *Saffels v. Rice*, 40 F.3d 1546, 1548 (8th Cir. 1994); *EEOC v. Romeo Community Schs.*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enterps.*, 881 F.2d 1006 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

10. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) ("cases of statutory construction . . . begin, of course, with the language of the statute"); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (same).

statutory construction. Rather than beginning with the text of the statute, the statutory language entered the court of appeals' analysis only at the end. The court reasoned that: (1) the FLSA is "humanitarian" legislation, and thus, whenever possible, it must be broadly construed in favor of plaintiffs[11]; (2) unless the phrase "file a complaint" includes water-cooler conversations as well as court and agency filings, individuals making informal complaints of this sort will be without protection; and (3) the phrase "filed a complaint" is elastic enough to embrace a construction in which the word "file" means "utter." At each step in this reasoning, the court erred.

First, courts enforce statutes, not purposes. Unless the words selected by Congress are truly ambiguous, extrinsic aids to construction are simply irrelevant. More specifically, "rules" of statutory construction, like the remedial or humanitarian purposes of a piece of legislation, "are only admissible to solve doubt not to create it." *Railroad Comm'n of Wisconsin v. Chicago Burlington & Quincy R.R.*, 257 U.S. 563, 588-89 (1922); *see also United States v. Oregon*, 366 U.S. 643, 648 (1961).[12]

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11. The "plaintiffs win" rule of construction endorsed below fails to acknowledge that the legislative process is fueled by compromise. Indeed, the FLSA itself is remarkable as much for its exceptions, exemptions, and limitations as it is for its prohibitions and applications. To assume away the possibility that Congress intended to narrow the breadth of a portion of the Act — even when presented by compelling evidence that such a construction was intended — is to predetermine the judicial inquiry before it has even begun.

12. *United States v. James*, 478 U.S. 597, 605 (1986) ("assertions of ambiguity do not transform a clear statute into an ambiguous provision"), *citing TVA v. Hill*, 437 U.S. 153, 173 and n.18 (1978).

Second, according to the court's opinion, the plaintiffs in this case were terminated en masse for complaining that as ticket sales agents, they were entitled to overtime wages. The kind of conduct the court described — resort to "mutual aid or protection" to secure better terms and conditions of employment — is explicitly protected by the National Labor Relations Act, 29 U.S.C. § 157, and anyone terminated for exercising this right can obtain relief from the National Labor Relations Board. Had the plaintiffs pursued their NLRA remedies, they would not have received a jury trial — or the runaway punitive damage award returned by the jury in this case — but the Ninth Circuit's apparent belief that only a broad construction of the FLSA could protect these individuals is simply wrong.

Third, it is simply not possible to construe the word "filed" to mean "expressed." Congress plainly understood the phrase "filed a complaint" in its "familiar legal sense."[13] An individual "files a complaint" when she takes formal steps to invoke the protections of the Act. Under any reasonable construction of the phrase, an employee does not "file a complaint" when he has an oral exchange with his boss, or sends her an email or a memo describing his dissatisfaction.

The court of appeals offered only one explanation for its construction — other than the Act's "animating spirit" — *i.e.*, that Congress would have known that someone instituting a union grievance proceeding is often said to have "filed" a grievance. Pet. App. at 9a-10a. We can presume that Congress was aware that union members "file" grievances, and some day the Court may be asked to decide

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13. *Bradley v. United States*, 410 U.S. 605, 609 (1973), *quoting*, *Henry v. United States*, 251 U.S. 393, 395 (1920).

whether the formal invocation of a union grievance procedure constitutes the filing of a complaint related to the FLSA, but that question is not posed here, and the court of appeals did not limit its holding to the initiation of such a formal process. Rather, the court held that any employee gripe on the subject of overtime constitutes a "filed complaint." The plain language of the statute will not bear that result.

Finally, even if the language is ambiguous, the court of appeals dismissed far too quickly the compelling evidence that Congress intended the FLSA to have a more limited anti-retaliation provision than other federal employment laws. The court acknowledged that the anti-retaliation provision in Title VII, unlike the FLSA, explicitly prohibits discrimination against anyone who has *either* instituted a proceeding under that Act (*i.e.*, filed a complaint) *or* "opposed any practice made an unlawful employment practice by [Title VII]," for example by complaining about discrimination to the employer. 42 U.S.C. § 2000e-3(a). The court found this difference unenlightening, however, explaining that the FLSA was enacted long ago, in 1938, at a time "when statutes were far shorter and less detailed" than they were 26 years later when Title VII was passed. Pet. App. 11a.

One need not engage in such a dubious "generational" analysis, however, to divine Congress's understanding of the statute. The Senate version of the FLSA initially contained an anti-retaliation provision which explicitly prevented an employer from taking adverse action against an employee because the employer believed the employee "may" file a complaint. S. 2475 § 22(c), 83 Cong. Rec. 1577 (1937). This version of the anti-retaliation provision was defeated, however, and it was replaced by the existing one, which extends only to "filed . . . complaint[s]," not anticipated or threatened ones.

Moreover, the court of appeals' "generational" analysis cannot explain away the starkly different anti-retaliation provisions in the FLSA, on the one hand, and Title VII, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act on the other. *All* of these other statutes contain provisions explicitly protecting those who "oppose" discriminatory practices through internal complaints.[14] *Only* the FLSA limits the reach of its anti-retaliation provision to those "fil[ing] complaint[s]." Indeed, in 1966, when Senator Javits initially introduced legislation to address the problem of age discrimination, he proposed an amendment to the FLSA and, presumably knowing that the FLSA's existing anti-retaliation provision contained no "opposition clause," he imported into the FLSA *Title VII*'s anti-retaliation language. H.R. 13712, 89th Cong. 2d Sess. § 601((f)(3) (1966). When the Age Discrimination in Employment Act became law the next year as a free-standing piece of legislation, it expressly incorporated the procedures of the FLSA, 29 U.S.C. § 626, but nonetheless adopted an anti-retaliation provision modeled on Title VII's opposition clause. 29 U.S.C. § 623(d).[15]

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14. *See* 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 2615(a)(2) (FMLA).

15. Congress had good reason to include a less expansive anti-retaliation provision in the FLSA than in discrimination statutes such as Title VII. Title VII depends for its enforcement largely on voluntary compliance, not formal litigation; protecting individuals engaged in informal efforts to secure compliance encourages these non-litigation modes of dispute resolution. *International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of

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The court of appeals evidently concluded that the plain language of the FLSA's anti-retaliation provision was inadequate to serve what the court viewed as important policy goals. The judiciary's role, however, "is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (superseded by amended rule on other grounds).

II.

THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH MEANINGFUL GUIDELINES FOR COURTS TO USE IN DETERMINING WHETHER, AND IF SO UNDER WHAT CIRCUMSTANCES, INDIVIDUAL MANAGERS MAY BE HELD ACCOUNTABLE FOR VIOLATIONS OF THE FLSA.

"[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). The statutory definitions of the terms "employer," "employee," and "employ"[16] have only "some bearing" on these problems. *Rutherford Food*, 331 U.S. at 728.

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Title VII"). The FLSA enforcement scheme, by contrast, relies on the primacy of government action, and individuals are actually *precluded* from engaging in binding, informal dispute resolution without government supervision. *See* 29 U.S.C. § 216(c); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292-93 (1960). Thus, the very different anti-retaliation provisions effectively channel complaints into the arenas where Congress intended them to be resolved.

16. According to the FLSA, the term "'[e]mployer' includes any person acting directly or indirectly in the interest of an employer (Cont'd)

Given the ambiguity of the statutory standards, their potentially breathtaking scope, and the almost total lack of guidance from this Court, the Department of Labor and the courts of appeals have adopted, not surprisingly, quite different standards for determining when an individual manager may be liable for overtime or minimum wage payments required by the Act:

- In *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983), the First Circuit held two corporate officers individually liable because they held "a significant ownership interest [in the business and] operational control of significant aspects of the corporation's day to day functions, including compensation of employees and [because they] personally made decisions" which lead to the alleged violations. *Id.* at 1514. *See also Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (dominant factor in determining personal liability is whether corporate officers involved personally made the determination to violate the Act).

- The Second Circuit asks "whether the alleged employer possessed the power to control the workers in question . . . with an eye" to the four-factor "economic reality" test of whether the alleged employer (1) had the power to hire and fire the

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in relation to an employee," 29 U.S.C. § 203(d), the term "'employee' means any individual employed by an employer," *id.* § 203(e)(1), and the term "'[e]mploy' includes to suffer or permit to work," *id.* § 203(g).

employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). An equity interest in the enterprise is not required. *Accord Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir.), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983).

- The Eleventh Circuit has applied a "total employment situation" test. It relies on three unweighted factors, and does not appear to require culpability on the part of the individual manager. The court considers (1) whether the plaintiff was employed on the premises of the alleged employer, (2) how much control the alleged employer exerted on the employees, and (3) whether the alleged employer had the power to fire, hire, or modify the employment condition of the employees. *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). No equity interest is necessary.

- The Department of Labor has taken the position that any individual manager can be held personally liable for FLSA violations so long as the manager "exercised control over the work situation." *Baystate*, 163 F.3d at 677.

The Ninth Circuit has devised its own, open-ended standard. According to the court below, "[w]here an individual exercises 'control over the nature and structure of the employment relationship,' or 'economic control' over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability." Pet. App.

25a.[17] Under this definition, *any* individual who happens to set another employee's schedule, evaluate his performance, or exercise any control over where and how the employee is to perform his job, qualifies as an employer and therefore is financially responsibility for wage and hour violations. For liability to attach under this standard, the plaintiff need not prove that the manager played any role whatever in the violation alleged.

Imposition of liability on this basis is anti-textual. The statute makes it "unlawful for any person" to pay sub-minimum wages or to refuse to pay required overtime, 29 U.S.C. § 215(a)(2), and provides that the "employer who violates" these provisions, or who engages in proscribed retaliation may be held liable. 29 U.S.C. § 216(b). But an individual — even one who is deemed to be an "employer" — cannot be held liable for damages unless he or she *personally violates the Act's provisions.*

The Ninth Circuit's liability scheme is also grossly unfair. Suppose, for example, a manager is informed by her superiors that the company has consulted with legal counsel and, based on a court of appeals decision from another circuit, has been advised that one hundred of the managers' subordinates are exempt from the FLSA's overtime requirements. *See generally* 29 U.S.C. § 213. On the basis

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17. The court of appeals concluded that the district court's instruction in the case was "entirely consistent" with the appellate court's formulation, even though the instruction required, as a precursor to individual liability, a finding that the individual defendants had a "significant ownership interest" in the enterprise. *Id.* It is unclear from these two sentences whether an ownership interest is or is not a predicate to individual liability in the Ninth Circuit.

of this legal advice, the company instructs the manager not to pay these subordinates overtime wages.

In subsequent litigation against the manager, in a case of first impression in the circuit, the court of appeals holds that the employees are not exempt and that the employees are entitled to overtime compensation. The manager qualifies as an employer under the Ninth Circuit's definition, and thus she would responsible for two years of overtime payments to her one hundred employees. In the Ninth Circuit's view, it would be irrelevant to the manager's individual liability both (1) that the manager was uninvolved in the challenged decision and (2) that the company had a good faith basis for its classification decision.

Consistent with the Court's recent approach to analogous federal employment statutes,[18] the Court should take this opportunity to resolve the confusion pervading the circuits with regard to whether, and if so under what circumstances, FLSA liability attaches to individual managers.

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18. *Cf. Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2126-30 (1999) (addressing proper legal standards for imputing managerial acts to an employer in the punitive damages context); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (addressing standards governing employer liability for hostile environment harassment perpetrated by supervisory employees).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEAL D. MOLLEN
Counsel of Record
KEITH R. FENTONMILLER
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004
(202) 508-9500

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States